United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

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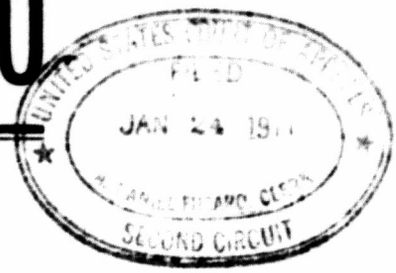

United States Court of Appeals
FOR THE SECOND CIRCUIT

BIG SEVEN MUSIC CORP. and ADAM VIII, LTD.,

Plaintiffs-Appellants,

against

JOHN LENNON, APPLE RECORDS, INC., HAROLD SEIDER, CAPITOL RECORDS, INC. and EMI RECORDS LIMITED,

Defendants-Appellees,

and

MORRIS LEVY,

Additional Defendant on Counterclaims-Appellant.

REPLY BRIEF FOR APPELLANTS BIG SEVEN MUSIC CORP. AND ADAM VIII, LTD.

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-against-	:	
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Defendants-Appellees,	:	Docket No. 76-7454 76-7480
-and-	:	
MORRIS LEVY,	:	
Additional Defendant on Counterclaim-Appellant.	:	

REPLY BRIEF FOR APPELLANTS BIG SEVEN MUSIC CORP. AND ADAM VIII, LTD.

This reply brief is submitted on behalf of plaintiffs-appellants Big Seven Music Corp. ("Big Seven") and Adam VIII, Ltd. ("Adam VIII") in response to the joint brief of defendants-appellees John Lennon ("Lennon"), Harold Seider ("Seider") and Apple Records, Inc. ("Apple").

In order to avoid duplication, plaintiffs will follow the same procedure as in the case of their main brief:

This reply brief will address itself to plaintiffs' claim for breach of an oral agreement made in October 1974 and Big Seven's alternative claim for breach of a written settlement agreement made in October 1973.

A separate reply brief filed on behalf of Morris Levy ("Levy") will address itself to the trial court's award of compensatory and punitive damages on defendants' counterclaims, and plaintiff Adam VIII respectfully joins in all aspects of Levy's brief.

DEFENDANTS' ATTEMPT TO REARGUE A MOTION WHICH WAS DENIED BY THIS COURT ON DECEMBER 14, 1976

In a footnote on page 2 of their brief, defendants argue that this Court is without jurisdiction to hear this appeal because plaintiffs and Levy have entered into a separate settlement with Capitol and EMI.

Defendants neglect to inform the Court that they previously made a motion to dismiss the appeal on the same grounds. Defendants' motion, which was supported by over 80 pages of affidavits and briefs, was denied from the bench on December 14, 1976 by Judges Mulligan, Timbers and Van Graafeiland, who expressed the view that the motion was utterly without merit. We find it astonishing that counsel for defendants do not even refer to their prior motion and its disposition by this Court.

As we explained in our answering papers to defendants' motion, we settled only with Capitol and EMI (while reserving all rights against Lennon, Seider and Apple) for the following reasons:

A. A full affirmance of the judgment of $419,800 plus interest and costs, bringing the total amount to over $450,000, would have had serious adverse consequences for Adam VIII, which is a small privately-owned corporation, and for Levy, as an individual stockholder of Adam VIII and defendant on counterclaim.

B. A substantial amount of working capital and borrowing was tied up in the $466,228 appeal bond posted by Adam VIII and Levy, since Adam VIII and Levy had to deposit with the surety company cash and securities worth approximately $492,000.

C. Judge Griesa had determined that Lennon, Apple and Seider had deliberately concealed Levy's contract claims from Capitol and EMI (A.3476) so that Capitol and EMI were in a position to argue on this appeal that they should be treated differently from Lennon, Apple and Seider in that they were innocent of any wilful wrongdoing. (Affidavit of William Schurtman, sworn to December 9, 1976, submitted in opposition to defendants' motion to dismiss.)

REPLY TO DEFENDANTS' COUNTER-
STATEMENT OF THE CASE (Def. Br. p.3)

Defendants are correct in pointing out that just before trial plaintiffs dropped certain claims in order to simplify the issues that were about to be tried to a jury. We apologize for having neglected to mention in our main brief that we dropped the Sherman Act §2 claim.

Contrary to the assertion at page 4, footnote, of defendants' brief, Lennon did not amend his counterclaim to seek damages for his own lost royalties but limited his demand to an accounting of Adam VIII's profits and injunctive relief. This point is discussed more fully at page 6 of Levy's separate reply brief.

Although defendants are very free with their accusations that we have miscited and distorted the record, we have rechecked each and every challenged record reference and we respectfully submit that our

references are in all instances accurate and fair.* The same cannot be said for defendants' brief. While we will not burden the Court with a point-by-point rebuttal of defendants' counterstatement, we will call attention to their more egregious miscitations of the record.

REPLY TO DEFENDANTS' COUNTER-STATEMENT OF THE FACTS (Def. Br. p.7)

The October 1973 Settlement Agreement (Def. Br. p.7)

Turning first to the October 1973 Settlement Agreement, it is curious that if the parties intended Lennon's "next album" to be the Spector-produced "oldies" album, they did not so define "next album" in the settlement agreement made by experienced counsel in open court (PX 11 at E 13), and confirmed in a letter to Lennon from his lawyers (PX 12 at E 19), particularly since the lawyers were careful to explain to Judge Griesa that the words "next album" were not intended to refer to an album, "Mind Games", which Lennon had already recorded and was soon to release, but rather to "the second album to be released" (PX 11 at E 18).

We submit that Levy was fully justified in regarding Lennon as having failed to comply with the terms of the settlement agreement when Lennon released the chronologically "next" album ("Walls and Bridges") without including three Big Seven songs.

Lennon's Problems Completing the "Oldies" Album (Def. Br. p.8)

Defendants state, at page 8 of their brief, that "in early October [1974] Lennon began working on the Spector Tapes again (A.698)" and imply that this work preceded the October 8, 1974 Cavallero meeting.

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* Due to poor editing, we inadvertently omitted several citations of additional references to support our arguments, e.g., A.1787, to support our contention that the parties agreed to proceed with U.S. mail order even if no consent was forthcoming for retail fulfillment and foreign rights; A289-299, 1711, 1757, 1758, to support our contention that Seider told Levy in November 1974 that there was no problem with retail fulfillment and foreign rights.

This is an outright distortion of the record. At A.698 Lennon merely stated that he went back to the Spector tapes:

> "[s]ometime after I had finished Walls and Bridges" (emphasis supplied),

and the record is clear that prior to the October 8, 1974 Cavallero meeting Lennon had lost interest in completing the "oldies" album. (See pages 11-12 of our main brief.)

The Participants in the Cavallero Meeting (Def. Br. p.8)

Since Bernard Brown, an employee of Apple's English affiliate at the time of the Cavallero Meeting (A.481), admitted that he did not participate in the business discussions at that meeting (A.532) and his only alleged recollection of what was said was squarely contradicted by both Lennon and Seider (compare A.498, 499 with A.714, 2037), we will not belabor the issue of whether Levy and Kahl met Brown on October 8 or only on October 9, except to point out that Levy and Kahl had a clear recollection of meeting Brown on October 9 (A.437, 1301) but had difficulty recalling his presence on October 8.

Defendants' Attack on the Testimony of Levy and Kahl (Def. Br. p.9)

In a footnote on page 9 of their brief, defendants level a general charge that Levy's testimony was at times inconsistent with that of Kahl. Leaving aside the fact that there were even greater inconsistencies in the testimony of Lennon and Seider (compare, e.g., Lennon, A.1907 with Seider, A.1178-1179; Lennon, A.1911-1912 with Seider, A.2001-2002), we certainly concede that there were also some inconsistencies between the testimony of Levy and Kahl. We submit that these inconsistencies

are to be expected when two individuals try to recall events and conversations taking place many months earlier and when they give lengthy testimony first in depositions and then again at trial. If anything, these inconsistencies demonstrate that Levy and Kahl were not the well-coached and well-rehearsed witnesses that defendants claim they were and that no attempt was made to orchestrate their testimony into a perfectly uniform story. However, Levy and Kahl were in substantial agreement on the critical issues of the case and, more importantly, there is other corroboration in the record (such as the testimony of Lennon, Seider and several independent witnesses cited in our main brief) that Lennon agreed to make a television album for Levy.

Lennon's Contractual Commitments (Def. Br. p.10)

We believe this point is fully covered at pages 14-15 and 38-41 of our main brief.

Klein told Levy about the U.S. mail order exception in the context of a negotiation for a Beatles television package at a time when Klein was the Beatles' manager (A.167, 168, 1575,1576). Even though Levy did not have access to the actual contracts until we obtained copies during discovery in this case, the Apple-Capitol contract did in fact contain the explicit exception for mail order rights (DX C-2 at E 249 quoted at page 15 of our main brief) which Klein had told Levy it contained.

The Cavallero Meeting (Def. Br. p.12)

As we show at pages 49 and 50 of our main brief, several independent experts, who were highly regarded by the trial judge (A.3820),

testified in Phase III of the trial that in their opinion Lennon's recording of a single Big Seven song could have generated additional royalties of over $200,000. In the light of this testimony, Levy's claim at the October 8, 1974 Cavallero Meeting that Lennon's failure to comply with the 1973 Settlement Agreement (which required Lennon to record three Big Seven songs) had damaged Levy to the extent of $250,000 was certainly not an unreasonable claim for him to make.

At page 13 of their brief, defendants make the incredible assertion that by the time of the Cavellero meeting:

> "Lennon had not lost his enthusiasm for, or interest in, the 'oldies' album nor was he 'disgusted' with the project."

This assertion is not only inconsistent with Defendants' Amended Statement of Undisputed Facts filed on the eve of trial (PX102, ¶52 at E125), but squarely contradicts the deposition testimony of Seider (which he tried to recant at trial) that:

> ". . . John started to go into a discussion of his attempts, having now finished the Walls and Bridges album, to salvage those [Spector] tapes and he indicated again the fact that only six of the tapes were at best salvageable and that he was, you might say, disgusted with the project, that he had lost all desire. He thought that the timing was all off, the delay created by the Spector difficulty made an album such as this inappropriate to complete. . . . He had lost the interest in completing the album." (Emphasis supplied) (A.2001-2002.)

At page 14 of their brief, defendants say:

> "There was no discussion of the October 1973 Settlement Agreement during the Cavallero Meeting . . ."

That is an odd assertion for defendants to make in view of their concession that the meeting was called expressly for the purpose of discussing Levy's claim that Lennon had breached the October 1973 Settlement Agreement (Lennon, A.700,701) and Lennon's admission that the meeting opened with Levy's assertion that there had been a breach (Lennon, A.706-707). The creation of a television package was the very method selected to resolve the alleged breach while at the same time enabling Lennon to recoup the cost of the Spector Tapes and to make money by completing the "oldies" album as a television package, thereby avoiding the hostile critics and the anticipated weak regular retail market.

The Issue of the "World-Wide" Rights (Def. Br. pp.15-24)

Defendants devote 9 pages of their brief to their argument that plaintiffs had difficulty formulating the terms of the alleged agreement because we originally pleaded a grant of "world-wide" rights and then, at trial, limited our claim to United States mail order rights.

Defendants persist in ignoring the fact that as early as June, 1975 Levy testified in his deposition (and again at trial):

1. That it was his understanding that at the October 8, 1974 Cavallero Meeting he was granted United States mail order rights (which he understood to be covered by an express exception in the Apple-Capitol contract*) but that Seider was to check whether EMI's or Capitol's consent was

* Defendants continue to express astonishment that Levy did not see the Capitol-EMI-Apple contracts before commencing this case and that Levy relied in part on a conversation with Klein. We again note that Levy's conversation with Klein was not a casual chat but occurred in 1973 in the context of a business negotiation for a Beatles television package (A.167, 168, 1575, 1576) and that when we finally obtained the contracts during discovery they corroborated what Klein had told Levy.

required for the other rights (DX CM-1 103, 107, 109-110; Levy, A.1787, 1863-1864); and

2. That in November 1974 Seider told him that it was unnecessary to see EMI and that there would be no problem with Capitol (DX CM-1 178; DX CM-3 378; Levy, A.289-294).*

It was on this basis that plaintiffs hoped to prove to a jury or to a trial judge that Levy obtained not only the United States mail order rights at the October 8, 1974 meeting but also received subsequent confirmation from Seider prior to January 1975 that Levy had the retail fulfillment center and foreign rights as well. However, as plaintiffs' counsel carefully explained in his opening statements to the jury (Tr. of January 13, 1976, pp.20, 21)** and again to Judge Griesa (A.28-30), we were drawing a clear distinction between the two sets of rights: with respect to United States mail order rights, we could prove that there was an express written exception in the Apple-Capitol contract; with respect to the other rights, we would have to rely on Seider's statement to Levy in November 1974 that there would be no problem with EMI and Capitol. We fully recognized that the proof on the first point was much stronger than the proof on the second point and, while our pleadings and other papers asserted our maximum possible claim, we put defendants on notice as far back as June 1975 that if the proof did not support the second issue, we would nevertheless rely on the definite grant of U.S. mail order rights on October 8, 1974.

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* At pages 24 and 43 of our main brief, we inadvertently referred only to A.293-294 instead of to Levy's full testimony on this point at A.289-294. See also, A.1711 and 1757-1758.

** When Mr. Levy testified in the first trial, before a jury, he also clearly distinguished between mail order and retail fulfillment and foreign sales. Tr. of January 13, 1976, pp.44-47.

We find it difficult to understand why plaintiffs should be penalized for having alleged their maximum possible claim under the facts as they understood them, while fully explaining during discovery and again at trial the different facts on which they relied to prove the separate elements of their claim (i.e., very strong facts with respect to U.S. mail order rights; a weaker set of facts, namely Seider's November 1974 assertions to Levy with respect to world-wide and retail fulfillment rights which, it turned out, had not been authorized by EMI and Capitol).*

At pages 23-24 of their brief, defendants also challenge our contention that Judge Griesa erred when he stated in his opinion that "even Levy's testimony fails to reveal" that there was a discussion at the October 8, 1974 meeting that Levy would get the United States mail order rights even if Lennon could not grant retail fulfillment and foreign rights.

At page 42 of our main brief we quoted the testimony of Levy (A.1863-1864) which we contend was overlooked by the district judge. Defendants now try to justify Judge Griesa's failure to refer to this testimony by arguing that the testimony did not show that there was an "agreement" on this point and also by urging that Levy's testimony was not explicit enough. Defendants also claim that this testimony should be disregarded because it was given on redirect. Defendants have apparently

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* Defendants' argument at the bottom of page 19 misses the point. Of course we knew that Seider told Levy on January 30, 1975 that there was no deal at all. We nevertheless intended to prove that the Apple-Capitol contract contained an exception for U.S. mail order rights and that Lennon and Apple had granted plaintiffs the unconditional right to handle U.S. mail order sales. What we were not certain of, but hoped to prove at trial, was whether Seider's November 1974 assurances to Levy that he would also get retail fulfillment and foreign rights were in fact authorized by Capitol and EMI. As it turned out, the evidence showed that in November 1974 Seider misled Levy just as he misled Capitol in January 1975 (A.3476).

forgotten that earlier in the trial, during Levy's cross-examination by counsel for Capitol and EMI, Levy, in response to a question by the trial court as to the precise scope of the agreement, testified:

> "We agreed and were set on mail order in the United States. They would let me know about the retail fulfillment centers in the United States later but we were going ahead with mail order anyway. If we got EMI's permission we would go worldwide." (Emphasis supplied) (A.1787.)

As we noted in our main brief, the ultimate question of whether there was an enforceable oral agreement is an issue of law to be based on specific findings of fact. Our purpose in calling attention to Judge Griesa's clearly erroneous finding that Levy had failed to testify as to such a discussion was to show that the trial judge had based his finding in this area on an incomplete recollection or reading of Levy's testimony. The district judge said that Levy had not testified on this point when in fact he had.

With respect to the manner in which Levy expressed himself, it should be pointed out that Levy is not a college or even high school graduate - he is a man with a sixth grade education (A.90) who has been very successful in his business endeavors but who tends to express himself in very colloquial language. In assessing his testimony on this and other issues, this is a factor which ought to be taken into account.

In any event, since Judge Griesa regarded the issue of the United States mail order rights with or without retail fulfillment and foreign rights as critical to his final decision that there was no enforceable oral agreement, we submit that his clear error in overlooking Levy's testimony on this point in itself requires reversal of the decision below or at least contributes substantially to our contention that the

trial court's decision, taken as a whole, was mistaken and should be reversed.

Events Following the Cavallero Meeting (Def. Br. p.24)

At page 25 of their brief, defendants argue that "nothing said or done by Lennon after October 8th" can assist plaintiffs in proving that an oral agreement was made on October 8, 1974.

Defendants cite no support for this proposition and ignore legal authorities cited in our main brief to the effect that the subsequent conduct of parties can be used to prove the existence of an oral agreement. McCormick, Evidence, §§ 229, 269 (1954); Wigmore, Evidence, § 272 (1940); cf., Hellenic Lines, Ltd. v. Gulf Oil Corp., 340 F.2d 398 (2d Cir. 1965).

Consistent with their view that subsequent conduct is irrelevant, defendants pointedly ignore, in their Counterstatement of the Facts (as well as in their legal argument) the following:

1. Lennon's repeated statements to various disinterested witnesses - a banker, a record company executive, a lawyer and a disc jockey -that he was making a television album for Levy and the discussions of the nature of the album and its $4.98 price. (See pages 19-20, 22-23 and 25-26 of our main brief.)

2. Lennon's request for and acceptance of Big Seven's assistance in completing the television album with respect to songs in which Big Seven had no copyright and hence no incentive to help except for the television deal. (See pages 18-19 of our main brief.)

3. Lennon's testimony at trial that until he was persuaded by Capitol representatives on January 28, 1975 to take the album away from Levy and let Capitol distribute it through regular retail channels (Lennon, A.1002), he had fully intended to put out the album as a television package (Lennon, A.1002, 1916) and had planned to do so through Levy (Lennon, A.1916-1917).

Defendants fail to address themselves to this evidence. They do not attempt to refute it or to explain it away; they simply pretend that it is not in the record. But it is and it shows that Lennon did in fact make the record album "for Levy" - the very condition postulated in Judge Griesa's determination that "there was a tentative agreement for Lennon to provide 15 to 16 rock and roll songs in the event that Lennon in fact made a record album for Levy." (A.175a.)

At page 26 of their brief, defendants argue that the 7-1/2 i.p.s. tape which Lennon delivered to Levy was only a very rough, unfinished recording. However, Lennon testified that the tapes were finished at the time he gave them to Levy (Lennon, A.730) and explained that he had already recorded all the tracks for the rock and roll album (Lennon, A.727, 729), over-dubbed horn and sax parts (Lennon, A.730), and re-sung all the vocal parts (Lennon, A.731).

It should also be noted that at the trial Lennon did not dispute the testimony by Levy and Kahl that when he ordered the tape to be delivered to Levy, Lennon said:

> "It's finished. . . I don't want to hear [it] again. . . it's your baby." (A.242-243; A.1349.)

The fact that Lennon decided to make additional changes in the recording in February 1975, after he had decided to allow Capitol to release the album through regular retail channels, does not alter the fact that in November 1974 he told Levy that the album was finished.*

At page 27 of their brief, defendants attempt to rehabilitate Graham's testimony concerning the November 18, 1974 meeting by contending that his alleged notes of that meeting refer only to retail fulfillment sales. This explanation, however, fails on two grounds. First, defendants offer no reason why, if the parties were discussing a deal that would include both mail orders and retail fulfillment sales, they would only calculate the numbers for retail fulfillment sales. Second, Graham's figures are a hodgepodge of both types of sales: the advertising allowance of $1.25 per album is based on mail order sales (A.1725) while the "$1.50 . . . profit to stores" is obviously based on retail fulfillment sales.

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* If Lennon truly intended as far back as October 1973 to change "You Can't Catch Me" (Def. Br. p.26) why did he not do so before delivering the 7-1/2 i.p.s. tape to Levy in November 1974? The fact that on January 30, 1975 Levy offered Lennon the customary courtesy of further editing does not contradict the fact that Lennon and Levy had both regarded the master tape as "finished" in November 1974.

Moreover, while it is quite possible that if Lennon had cooperated in the final production of "Roots", Adam VIII would have used a 15 i.p.s. tape which Lennon now claims to prefer, the fact is that the only tape delivered by Lennon was a 7-1/2 i.p.s. tape and defendants' brief does not challenge the evidence referred to at pages 21-22 of plaintiffs' main brief that 7-1/2 i.p.s. tapes are often used for commercial albums, especially television packages.

Thus, we submit that Graham's own notes contradict his testimony and that of Seider.

Levy's January 9th Letter and the Events Thereafter (Def. Br. p.30)

In trying to explain away their failure to respond to Levy's January 9, 1975 letter (PX31 at E30) - a failure which caused Judge Griesa to say during summation:

> "It is inconceivable to me that [the sending of a written reply] was not done. Isn't that an admission maybe there was a contract?" (A.2282),

and Seider's failure to disclose Levy's letter to Capitol (A.2081), defendants resort to some rather disingenuous arguments.

For example, they argue that when Seider met with Menon, Meggs and Coury on January 14, 1975:

> ". . . as he had not as yet received a copy of Levy's January 9th letter, he did not discuss it with them (A.2082)" (Def. Brief p.31),

even though Dolgenos had already read it to Seider over the telephone (Id.).

If Seider already knew that Levy was claiming a contract with Lennon, why did he fail to tell Capitol about it? And even if we accept defendants' ludicrous argument that Seider felt he could not inform Capitol of Levy's claim until he had physical possession of the letter, why did he fail to do so once he received a copy of the letter on January 20, 1975 (A.1245)?

It was precisely this type of conduct on the part of Seider

which led plaintiffs to contend that Seider had been playing off Capitol against Levy and which caused Judge Griesa to remark in his decision on Phase II of the case that:

> "The dealings with Levy and his claims to be entitled to issue his Roots album were concealed from Capitol and from EMI by Seider long after they should have been revealed by him to these parties. If Seider had not dissembled in the way he did the problems that have arisen might have been solved quicker . . ." (A.3476.)

Lennon, Seider and Apple are unable to explain Seider's conduct away and instead argue, at page 32, footnote, of their brief, that "[p]laintiffs' contention . . . that Seider tried to persuade EMI and Capitol to release the album and 'urged' Capitol to persuade Lennon to allow Capitol to do so, is an overstatement of the record." It is not. We need merely point to Menon's testimony that Seider, instead of urging Capitol's consent for Levy's package as he claimed he was trying to do, told Menon that

> "he [Seider] didn't believe I [Menon] would have interest in such a proposal" (Menon, A.2137);

to Seider's failure to disclose Levy's contract claims to Capitol (Seider, A.2081); and to Seider's telling Capitol to persuade Lennon to let Capitol market the album through "regular retail channels" instead of as a television package (Seider, A.1251).

REPLY TO POINT I OF DEFENDANTS' BRIEF
(The "Clearly Erroneous" Rule)

Defendants greatly overstate the import of Rule 52(a) of the Federal Rules of Civil Procedure when they contend, at page 36 of their brief, that findings based on the credibility of witnesses are "unassailable". As defendants well know, in the leading case of United States v. United States Gypsum Co., 333 U.S. 364 (1948) - a case which defendants have cited as the definitive statement of the meaning of "clearly erroneous" - the Supreme Court stated:

> "Despite the opportunity of the trial court to appraise the credibility of the witnesses, we cannot under the circumstances of this case rule otherwise than that Finding 118 is clearly erroneous." (Id. at 396.)

In Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 125-127 (1969), another leading case cited by defendants, the Court of Appeals similarly overturned certain findings of fact of the trial court and the Supreme Court affirmed.*

Defendants also ignore the fact that an appellate court is not bound by a trial judge's characterization of his "conclusions" as "findings". Tri-Tron Int'l v. Velto, 525 F.2d 432 (9th Cir. 1975), Cordovan Associates, Inc. v. Dayton Rubber Co., 290 F.2d 858 (6th Cir. 1961), 9 Wright & Miller, Federal Practice & Procedure, § 2579.

We submit that many of the district court's designated "findings" are, in fact, conclusions which are not sheltered by the "clearly erroneous"

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* Defendants also misstate the Supreme Court's holding in C.I.R. v. Duberstein, 363 U.S. 278 (1960); defendants neglect to mention that the factual inferences covered by the clearly erroneous rule are those drawn from undisputed basic facts. (Id. at 291.)

rule and we have called attention to these mislabeled findings in our main brief.*

Defendants also ignore the fact that while Judge Griesa openly expressed his doubts as to the credibility of Lennon and Seider during Phase I of the trial (A.2280-2281, A. 1977-1981), he did not question the credibility of Levy, Kahl or any of the independent witnesses during the trial or in his opinion on Phase I. Thus, one cannot simply assume, as defendants do, that Judge Griesa believed Lennon and Seider and disbelieved Levy, Kahl and the independent witnesses. Judge Griesa's written opinion shows on its face that he rested his decision on his conclusion that plaintiffs had presented insufficient proof to support their contention of an enforceable oral contract. We submit that in weighing the sufficiency of the proof and reaching such a legal conclusion, Judge Griesa committed reversible error and that the evidence taken as a whole, including Lennon's subsequent conduct and admissions, shows that there was an enforceable oral agreement for a television album.

REPLY TO POINT II OF DEFENDANTS' BRIEF
(Whether there was an oral agreement?)

As we have already noted at page 12 of this reply brief, defendants have chosen simply to ignore, both in their factual and legal

* Even defendants seem to have difficulty distinguishing between the district judge's "findings" and "conclusions". At p.15 they refer to Judge Griesa's decision that there was no agreement as "the most crucial finding made by the District Court". In the very next sentence they refer to it as a "conclusion". (Emphasis supplied.)

arguments, Lennon's repeated admissions to disinterested witnesses that he was making the album for Levy, Lennon's request for and acceptance of Big Seven's assistance in completing the television album and Lennon's trial testimony that he intended to put out the album as a television package through Levy.

We again submit that this evidence, which defendants do not challenge or refute, shows that when the trial judge concluded "that there was a tentative agreement for Lennon to provide 15 or 16 rock and roll songs in the event that Lennon in fact made a record album for Levy" (A.173a), that event in fact took place.

The trial judge's other stated reasons for concluding that plaintiffs had failed to prove the requisite elements of an enforceable contract - failure to prove an agreement as to United States mail order rights and failure to prove an agreement as to royalties (A.172a-173a) - are fully analyzed and challenged at pages 37-46 of our main brief. They are virtually ignored in Point II of defendants' brief which deals with all sorts of other matters that were not the stated reasons for Judge Griesa's decision and do not support that decision.

With respect to the trial court's conclusion that "plaintiffs have not shown that there was any agreement on the amount of royalty or method of calculation of the royalty" (A.173-174), which is discussed at pages 43-46 of our main brief, even if Judge Griesa rejected the specific testimony that the parties agreed on a royalty of 12% of $4.98 and concluded that the amount and method were left open, the New York courts have held that if an agreement can be rendered certain by reference to something certain, the courts will fill in that gap. Metro-Goldwyn-Mayer Inc. v. Scheider, __ N.Y. __ (December 28, 1976) (reported in N.Y.L.J.

1/11/77); 1 Corbin, Contracts, §95 (1963), Restatement 2nd, Contracts, §§230 and 247, and §2-204(3) of the New York Uniform Commercial Code.

As is stated in 1 Corbin, Contracts, §95, p.400-402 (1963):

> "The fact that the parties have left some matters to be determined in the future should not prevent enforcement, if some method of determination independent of a party's mere 'wish, will and desire' exists, either by virtue of the agreement itself or by commercial practice or other usage or custom." (Emphasis supplied.)

In the case at bar, the "something certain" to which the Court can make reference, if it determines that the district court did not err in concluding that plaintiffs failed to prove that the parties expressly agreed that Lennon would receive royalties of 12%, is the fact that Lennon customarily receives a royalty of 12% and that Seider testified that on November 18, 1974, when the possibility of a joint venture in Europe was discussed, he told Levy that Lennon would have to receive a royalty of 12% (Seider, A.1209).

Compare §2-204 of the Uniform Commercial Code, relating to the sale of goods, which provides:

> "(3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."

Defendants also do not challenge the point made at page 16 of our main brief that it is customary in the record industry for parties to make oral agreements with the "paperwork" to follow later or that Seider told Levy that a written agreement should be deferred until after the conclusion of the impending Beatles' settlement (A. 282).

The issue in this case is not: "Why was there no written contract?", since the parties did ultimately plan to have a written agreement although they did not make the writing a condition of the deal (A.294)*. The issue is whether the parties entered into an oral agreement which was enforceable when one side decided to renege on its commitments.

We again respectfully submit that the evidence taken as a whole shows that Lennon and Apple did agree to let Levy market a television album and that Lennon did complete an album for Levy especially designed for television but then, at the last moment, prevented Levy from marketing it.

REPLY TO POINTS III, IV, V AND VI OF DEFENDANTS' BRIEF
(Relating to the award of compensatory and punitive damages on Lennon's counterclaims)

These points are dealt with in Levy's separate reply brief. To avoid duplication, Adam VIII respectfully joins in Levy's separate brief.

* The New York courts have consistently held that if the parties intend an oral agreement to be binding and wish to reduce it to writing only to memorialize its terms, the fact that no writing is ever executed does not affect the oral agreement's validity. It is only if the parties manifest an intent to be bound only when the agreement is formalized by a writing that the oral agreement is ineffective. Scheck v. Francis, 26 N.Y.2d 467 (1970), Schwartz v. Greenberg, 304 N.Y. 250 (1952), S.J. Groves & Sons Co. v. L.M. Pike & Son, 41 A.D.2d 584 (4th Dept. 1973). There was no evidence that the parties intended the latter; indeed, Lennon's conduct and statements show that he intended to and did comply with the oral agreement immediately after it was made.

REPLY TO POINT VII OF DEFENDANTS' REPLY BRIEF
(Relating to the amount of damages awarded to Big Seven on its alternative claim for breach of the October 1973 Settlement Agreement

Defendants argue that we are taking inconsistent positions - that in challenging the damages awarded on Lennon's counterclaim, we question whether his fans would flock to purchase an uncharacteristic Lennon album of rock and roll songs sold through regular retail channels, while in our alternative claim for Lennon's breach of the 1973 settlement we argue that Lennon's performance of a third Big Seven song would have resulted in "cover record" income.

In the first place, defendants seem to be unconscious of the fact that they are themselves taking an inconsistent position -on the counterclaims they argue that even though Lennon's "Rock 'n' Roll" album was not characteristic (compared to say his "Walls and Bridges") it should have sold even more copies than "Walls and Bridges", while on the breach of the 1973 Settlement Agreement claim they argue that Lennon's performance of another rock and roll song would not have resulted in a single penny of "cover record" income despite the contrary testimony of three distinguished experts.

But, more importantly, we disagree that Big Seven's positions are in any way inconsistent. In the one case, the issue is whether an uncharacteristic Lennon album, which was badly reviewed by the critics and released

during a period when Capitol's sales were down 14-25% due to an economic recession, should have done as well or better than a characteristic Lennon album which received favorable reviews and was sold before the recession set in. In the second case, the issue is whether a revival of an old hit by a performer of Lennon's stature would interest other artists in performing the same hit, in their own styles. The two questions are simply not comparable.

While it is true that some of the examples offered by Big Seven to support its claim for cover record damages turned out to be deficient, we submit that Judge Griesa erred in denying Big Seven recovery for any lost cover record income, in the light of the testimony of three distinguished and independent experts that Big Seven could have earned substantial additional copyright royalties from cover records if Lennon had recorded an additional song from Big Seven's copyright catalog. We have discussed this issue fully at pages 49-53 of our main brief and defendants point to nothing in their reply brief which would justify the trial court's complete reversal of his earlier position that "it would be very hard to convince me that there was just no enhancement." (Emphasis supplied) (A.3821.)

REPLY TO POINT VIII OF DEFENDANTS' BRIEF
(The alleged waiver of Big Seven's claim for specific performance of the October 1973 Settlement Agreement)

Lennon is mistaken both when he contends that he complied with the licensing provisions of the October 1973 Settlement Agreement (PX 11 at E 13) and when he asserts that Big Seven has waived its rights thereunder.

As we pointed out in our main brief, Lennon's attorneys'

December 31, 1974 letter (PX 30 at E 29) was not a proper tender of a license because the royalty rate Lennon offered exceeded Big Seven's "customary" rate, the royalty provided in the October 1973 Settlement Agreement. Lennon seeks to overcome this obvious deficiency in his proffered "license" by asserting, without citation or explanation, that:

> "it is obvious that under the October 1973 Settlement Agreement, Big Seven had the duty of informing Lennon of the extent to which its customary rate was lower than the 2¢ statutory rate reflected in the Apple resolution (DX CE at E 319)". (Defendants' brief, pp.94-95.)

In the first place, there is no such thing as a "2¢ statutory rate" for the license of a master (Lennon is apparently confusing licensing royalties with copyright or mechanical royalties), and secondly, if Lennon wanted to know what Big Seven's "customary" rates were he could have asked instead of arbitrarily offering to enter into a license agreement at 2¢ per use, a rate almost twice Big Seven's customary rate.*

Moreover, the December 31, 1974 license offer required that Big Seven pay an advance against royalties, and Big Seven's counsel, at the time the October 1973 Settlement Agreement was read into the record, expressly said that Big Seven did not agree to pay any advances (PX 11 at E 16).

Furthermore, waiver and estoppel are equitable concepts which, it is respectfully submitted, should not be applied to grant Lennon the

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* Lennon also asserts, without explanation, or support, that PX 375 (E 200), which shows Big Seven's licensing rates ranged from a low of $.005 to a high of 2¢, "may be useful in giving an 'average' rate (which was the purpose of PX 375) but it does not define what is 'customary'" (Defendants' brief, p.94). Webster's New World Dictionary states that "customary" and "usual" are synonyms, and one of the definitions of "average" is "usual" or normal kind, amount, quality, rate, etc." In any event, PX 375 shows that the highest royalty rate Big Seven gives is 2¢ and that over 90% of its licenses are at substantially lower rates (the average rate is $0.01221 and the mean rate is between $0.010 and $0.0125), so irrespective of how one defines "customary" rates it is obvious that Big Seven's "customary" rate is lower than 2¢.

windfall of escaping all obligations to perform under the second part of the October 1973 Settlement Agreement, particularly since neither Lennon nor his lawyers answered Levy's January 9, 1975 letter, and since Lennon suffered no legal prejudice as a result of Big Seven's delay in asserting its alternative claim under the October 1973 Settlement Agreement.

Lennon's contention that he has been legally prejudiced by Big Seven's delay in asserting its alternative claim because he has incurred substantial attorneys' fees as a result is so ridiculous as to compel the conclusion that it was advanced for the sole and highly improper purpose of trying to convince the Court that although Lennon has been wholly unable to prove he suffered any legally cognizable damages as a consequence of Adam VIII's and Levy's allegedly improper conduct, he should nevertheless be allowed to keep the $145,300 awarded him because his legal fees have been at least that high.* As Lennon well knows, and as the district court expressly noted when it rejected Lennon's application for legal fees (a ruling from which Lennon has not appealed), this lengthy and costly litigation resulted not because Levy did not promptly assert Big Seven's rights under the 1973 agreement but in large measure because Lennon's agent and co-defendant, Seider, deliberately concealed Levy's 1974 contract claim from Capitol (A 3476).

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* This type of improper argument is of the same nature as the improper disclosure by Lennon's counsel, when he made his unsuccessful motion to dismiss this appeal (see p.2, supra), of the monetary details of settlement negotiations - a disclosure which evoked highly critical comments from Judge Mulligan.

REPLY TO POINT IX OF DEFENDANTS' REPLY BRIEF
(Relating to defendants' contention that Big Seven is judicially estopped from recovering damages for Lennon's breach of the 1973 settlement)

While Big Seven contends, for the reasons hereinafter set forth, that Lennon's judicial estoppel argument is wholly without merit, Big Seven respectfully submits that this issue is not even properly before this Court because Lennon did not timely file a cross-notice of appeal and the district court erred in permitting Lennon to file late.

Lennon's cross-appeal is untimely

Judgment was entered in this action on August 10, 1976 (258a). Plaintiffs and Levy filed their notice of appeal (263a) on September 8, 1976. Consequently, if Lennon wished to appeal from any portion of the district court's judgment, he was required, by Rule 4(a) of the Federal Rules of Appellate Procedure*, to file a notice of appeal no later than September 22, 1976.

On September 23, 1976, a day after the deadline for filing the cross-notice, Lennon moved the district court for leave to file it, and the district judge, over Big Seven's opposition, granted the motion (A4344). The only excuse offered by Lennon for his failure to file was that his attorney was busy on another case and forgot the filing deadline (269a, A.4340-4341).

* Rule 4(a) provides, in pertinent part:

> "[T]he notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days of the date of the entry of the judgment or order appealed from...If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days of the date on which the first notice of appeal was filed. . ."

Big Seven contends that the district court abused its discretion in granting Lennon's request. Rule 4(a) of the Appellate Rules authorizes late filing only "[u]pon a showing of excusable neglect", and the courts have uniformly* held that an attorneys' negligence or forgetfulness is not excusable neglect. Files v. City of Rockford, 440 F.2d 811 (7th Cir. 1971), Buckley v. United States, 382 F.2d 611 (10th Cir. 1967), Maryland Casualty Co. v. Conner, 382 F.2d 13 (10th Cir. 1967), United States v. Bowen, 310 F.2d 45 (5th Cir. 1962), Tucker Products Corp. v. Helms, 171 F.2d 126 (9th Cir. 1948), and Maghan v. Young, 154 F.2d 13 (D.C. Cir. 1946). See also, 9 Moore's Federal Practice ¶204.13[1] and Stern, Changes in the Federal Appellate Rules, 41 F.R.D. 297, 299:

> "The [Advisory Committee on Appellate Rules] intended that the standard of excusable neglect remain a strict one...[i]t is not meant to cover the usual excuse that the lawyer is too busy..."**

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* This Court's decision in Stirling v. Chemical Bank, 511 F.2d 1030 (2d Cir. 1975) is not inconsistent with this rule. There the Court remanded the case to the district court to determine whether there was excusable neglect in a situation where counsel timely served copies of the notice of appeal on the adverse parties and timely delivered the original notice to Americal Clerical Service ("ACS") for filing. ACS timely proffered the notice to the district court clerk, who refused to take it until the filing fee was paid. Appellants' counsel thereupon authorized ACS to advance the filing fees and received unequivocal assurances from ACS that the notice of appeal would be filed timely. Despite its promise, ACS did not file the notice, and appellants' counsel filed it as soon as he discovered the notice had not been filed.

** At the September 23, 1976 hearing on Lennon's motion, which was called on just two hours' notice, Big Seven's counsel quoted Professor Moore's statement that:

> "predictably it has been held that the heavy work load of counsel that caused him to overlook the time for appeal does not constitute excusable neglect" (A4343),

(footnote continued on next page)

Big Seven is not judicially estopped

Big Seven contends that it should not be judicially estopped from asserting its claims under the October 1973 Settlement Agreement because:

1. Big Seven's version of the material facts, as distinguished from their legal consequences, did not change at trial.

2. The Federal Rules of Civil Procedure permit parties to plead in the alternative, do not require statements of legal theory and encourage courts to decide cases on the evidence adduced, irrespective of the parties' formal claims.

3. To deny Big Seven the opportunity to recover on its claim will not protect the courts from fraud, the principal objective of the doctrine of "judicial estoppel", but will result in giving Lennon the undeserved "windfall" of escaping from liability for his breach of the October 1973 Settlement Agreement.

4. It is Lennon and not Big Seven who is seeking to "have his cake and eat it too". Big Seven seeks one or the other - either damages under the 1974 agreement or damages under the 1973 agreement. Lennon, on the other hand, asks to be relieved of liability under both agreements.

Before examining the law of "judicial estoppel", it is important to correct Lennon's distortions of the record.

**(footnote continued from previous page)

and offered to cite three such cases, one of which, Buckley v. United States, supra, involved a notice that was only two days late. The district judge, however, refused to receive these citations, stated that he would excuse the delay "unless the statute was absolutely ironclad", and lectured Big Seven's counsel on his lack of professional courtesy in not consenting to the late filing of Lennon's notice (A4344).

Contrary to Lennon's assertion, Big Seven did not adopt a new "story". Big Seven has consistently claimed and continues to claim that Levy and Lennon agreed to replace the October 1973 Settlement Agreement with a new agreement pursuant to which Lennon would record and Big Seven or its assignee would promote an album of Lennon's performances of rock and roll hits.

However, since the district court held that the 1974 agreement, which Big Seven thought and still thinks it made, was only tentative and legally unenforceable, and since the district court further found that the October 1973 Settlement Agreement was never abrogated, Big Seven takes the position that if it is to be denied the fruits of the 1974 agreement, it should at least be compensated for Lennon's breach of the 1973 settlement.

Rules 8 and 15 of the Federal Rules of Civil Procedure (which Lennon virtually ignores) clearly permit parties to plead in the alternative, do not require statements of legal theories, and encourage courts to decide cases on the evidence adduced, irrespective of the parties' formal claims.

Moreover, during the trial, Lennon as much as conceded that Big Seven had the right to amend to assert its claim for breach of the October 1973 Settlement Agreement, since once the district judge granted Big Seven leave to amend, Lennon's counsel said:

> "Your Honor, may I just say that I don't disagree with your Honor." (A.2344a63.)

Aside from Lennon's inconsistency, however, Lennon's assertion that a party, although permitted to plead in the alternative, is required

to make an election prior to trial, is simply untrue. See, e.g., Plant City Steel Corp. v. National Machinery Exchange, Inc., 23 N.Y.2d 472 (1969), Twentieth Century-Fox Film Corp. v. National Publishers, Inc., 294 F.Supp. 10 (S.D.N.Y. 1968), and Tollin v. Elleby, 77 Misc. 2d 708 (Civil Queens 1974).

It is also ironic that Lennon should seek to use the doctrine of "judicial estoppel" - an equitable rule that parties are not permitted to shift their legal positions or factual contentions when the circumstances of the shift suggest bad faith or fraud - as a shield for escaping liability for his own wilful violation of a settlement reached in open court. For that is clearly Lennon's intent. He does not deny that he entered into the October 1973 Settlement Agreement. He does not deny that he breached the 1973 settlement. He does not deny that Big Seven suffered damages as a consequence. He merely argues that because the district court found that Big Seven was unable to sustain its legal position that a new legally enforceable agreement was reached in 1974, Big Seven should be denied relief under the 1973 settlement as well.

None of Lennon's cases supports his position. Examination of them shows that they fall within three categories: (1) cases in which the parties shifted their testimony as to facts, Houghton v. Thomas, 220 A.D. 415 (1927), aff'd, 248 N.Y. 523 (1928), Smith v. Boston Elevated Ry. Co., 184 Fed. 387 (1st Cir. 1911), and O'Connor v. Board of Education, 65 Misc. 2d 40 (Sup. Herkimer 1970); (2) cases in which the parties adopted legal positions inconsistent with previously asserted positions which had led courts to confer substantial benefits on them, Selected

Risks Ins. Co. v. Kobelinski, 421 F.Supp. 431 (E.D. Pa. 1976), Tymon v. Linoki, 16 N.Y.2d 293 (1965) and In re Swales' Estate, 60 A.D. 599 (1901), aff'd, 172 N.Y. 651 (1902); and (3) cases in which the parties asserted facts in their pleadings which conclusively disproved their legal contentions, Hurd v. DiMento & Sullivan, 440 F.2d 1322 (5th Cir. 1971), cert. denied, 404 U.S. 862 (1971), and Bailey's Bakery Ltd. v. Continental Baking Co., 235 F. Supp. 705 (D. Hawaii 1964), aff'd., 401 F.2d 182 (9th Cir. 1968), cert. denied, 393 U.S. 1086 (1968).

Consequently, the principles of "judicial estoppel" simply do not apply to the facts of the instant case. Big Seven is not seeking to perpetrate a fraud on the courts. It is not seeking to change its factual contentions. It is not seeking to benefit twice from inconsistent legal positions. It merely asks that if this Court should affirm the decision below that plaintiffs failed to prove an enforceable 1974 contract (and we again urge that the decision was wrong and should be reversed), Big Seven should at least be allowed to recover its damages for Lennon's breach of the 1973 settlement which the district court found has never been abrogated.

CONCLUSION

For the reasons stated in the main and reply briefs submitted on behalf of Big Seven, Adam VIII and Levy, the judgment below should be reversed and the case should be disposed of in the manner set forth at pages 56-57 of Big Seven's and Adam VIII's main brief.

Dated: January 24, 1977

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
for the Second Circuit

BIG SEVEN MUSIC CORP. and ADAM VIII, Ltd.,

Plaintiffs-Appellants,

against

JOHN LENNON, APPLE RECORDS, INC., HAROLD SEIDER, CAPITOL RECORDS, INC. and EMI RECORDS LIMITED,

Defendants-Appellees,

and

MORRIS LEVY,

Additional Defendant on Counterclaims-Appellant.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Antonio Ramos, being duly sworn, deposes and says that he is over the age of 18 years, is not a party to the action, and resides at 10 Catherine Street, New York, NY 10038
That on January 24, 1977, he served 2 copies of Reply Brief

on Cleary, Gottlieb, Steen & Hamilton, Esqs.
One State Street Plaza
New York, NY

Nemeroff, Jelline, Danzig, Paley, Mandel and Bloch, Esqs.
350 Fifth Avenue
New York, NY

Marshall, Bratter, Greene, Allison & Tucker, Esqs.
430 Park Avenue
New York, NY

by delivering to and leaving same with a proper person or persons in charge of the office or offices at the above address or addresses during the usual business hours of said day.

Antonio Ramos

Sworn to before me this
24th day of January, 1977

John V. Esposito

JOHN V. ESPOSITO
Notary Public, State of New York
No. 31-4504150
Qualified in Nassau County
Commission Expires March 30, 1977